UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WKYC-TV, INC.	)	
	)	
	)	
	)	**CASE 8-CA-39190**
	)	
	)	
	)	
AND	)	
	)	
	)	
NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, LOCAL 42 A-W	)	
	)	
COMMUNICATION WORKERS OF AMERICA, AFL-CIO	)	
	)	

BRIEF OF *AMICI CURIAE* CLEAR CHANNEL OUTDOOR, INC., LEE ENTERPRISES, INC., AND STEPHENS MEDIA, LLC IN SUPPORT OF WKYC-TV, INC.

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Clear Channel Outdoor, Inc.
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I. PAYROLL DEDUCTION OF UNION DUES HAS BEEN CONSIDERED STRICTLY CONTRACTUAL FOR ALMOST FIFTY YEARS.

Payroll deduction of union dues (also known as "checkoff") is "strictly contractual." That is, the parties to a Collective Bargaining Agreement must negotiate a specific contract provision providing for payroll deduction of union dues. Such a provision ceases to be enforceable upon the expiration of a Collective Bargaining Agreement. This concept is hardly a novel one in the field of labor law. Almost fifty years ago, the Board considered this issue in *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), *enfd. in relevant part sub nom. Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). There the union had charged the employer with violating § 8(a)(5) of the Act by taking unilateral actions with respect to, among other things, union security and checkoff clauses. *Id.* at 1501. The Board stated that even though the company had acted unilaterally with respect to mandatory subjects of bargaining (union security and checkoff), there was nonetheless no unlawful act. *Id.* at 1502.

> First, with respect to union security, the Board stated:
> The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso of Section 8(a)(3). So long as

> such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. . . .

Bethlehem Steel, 136 NLRB at 1502.

The Board then addressed the related area of dues checkoff, emphasizing the contractual nature of such a provision:

> Similar considerations prevail with respect to [the employer's] refusal to continue to checkoff dues at the end of the contracts. The checkoff provisions in [employer's] contracts with the union implemented the union-security provisions. The union's right to such checkoffs in its favor, like its right to the imposition of union security, **was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force.**

Bethlehem Steel, 136 NLRB at 1502. (emphasis added). Thus as far back as 1962 the Board recognized that checkoff was a creature uniquely derived from a contract, and without any contractual provision to support it, a union is precluded from enforcing a union dues checkoff provision.

On appeal, the Court of Appeals agreed with the Board on this point:

> The right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in § 8(a)(3). The checkoff is merely a means of implementing union security. Since there was no contract in existence when the company discontinued these practices, its action was in conformity with law.

Industrial Union of Marine & Shipbuilding Workers v. NLRB, 320 F.2d 615, 619 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). This is settled law. The Board's position on the issue has been remarkably consistent throughout the years. Facing the issue again, the Board noted the unique characteristics of union security type provisions:

> Although most terms and conditions of employment continue during the hiatus period after the expiration of a collective bargaining agreement, a union security clause **does not survive**. . .

Trico Products Corp., 238 NLRB 1306, 1308 (1978). (emphasis added).

This reasoning again was present in *Peerless Roofing Co., Ltd.*, 247 NLRB 500, 505 (1980) *enfd.,* 841 F.2d 734 (9th Cir. 1981). There the Board held that, notwithstanding the fact that union security and checkoff are mandatory subjects of bargaining, and that the employer acted unilaterally with respect to them, there was nothing unlawful in the discontinuance of checkoff. The Board reasoned that the union's right to checkoff in its favor, like its right to the imposition of a union security provision, was created by contract and was only existent for so long as the contractual provision gave it life.

Shortly after the *Peerless* opinion, the Board again took the opportunity to reiterate the special characteristic that dues checkoff provisions hold—the requirement and necessity of a contractual provision.

Ortiz Funeral Home, 250 NLRB 730 (1980), *enfd*. 651 F.2d 136 (2nd Cir. 1981), *cert. denied,* 455 U.S. 946 (1982). The Board held that while the employer violated § 8(a)(5) of the Act by failing to continue to maintain the wages, hours, terms and conditions of employment established pursuant to contract, there was no violation in failing to maintain checkoff absent a contractual provision:

> Although the provisions of a collective bargaining agreement do not survive beyond its expiration, it is well established that after the expiration of such an agreement an employer may not unilaterally change the terms and conditions of employment established pursuant to that agreement until a new contract is negotiated or the parties reach an impasse in bargaining. **This, off course, does not apply to a union's right to dues checkoff, which is extinguished on expiration of the collective bargaining agreement creating that right.**

Id. at 731 n. 6. (emphasis added).Thus, the special distinction that a checkoff provision enjoys was recognized again. Without an *unexpired* contract containing a checkoff provision as the basis for checkoff, no checkoff can exist.

Two years later, the Board maintained its consistent position that dues checkoff provisions simply get treated differently than most other mandatory subjects of collective bargaining. *Robbins Door & Sash Co.*, 260 NLRB 659 (1982). There the Board held that after the expiration of a collective bargaining agreement, there was nothing unlawful about stopping dues

checkoff. In that case, the previous contract—which included a dues checkoff provision—had expired. Citing many of the cases discussed above, the Board held that under such circumstances:

> It is **well settled** that an employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement **which created that duty**.

Id. (emphasis added), 260 NLRB at 659. Again, the reason for allowing the employer to cease its participation in dues checkoff was the lack of existence of a current contract.

In *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111 (D.C. Cir. 1986), an employer attempted to expand the subjects that would be considered "strictly contractual." The company argued for the proposition that a hiring-hall provision should belong, as the court put it, in "the narrow class of exceptional mandatory subjects—so far limited only to union-shop, dues checkoff, and (to a limited degree) no strike provisions" that rely on the existence of a current collective bargaining agreement for their existence and enforceability. *Id*. at 1113.

The court declined to extend this analysis to the hiring hall provision, but reinforced its application to dues checkoff:

> Contrary to the Company's assertion, the existing exceptions are not rooted in such rule-swallowing logic. The well established exceptions for union-shop and dues-checkoff provisions are rooted in § 302(c)(4), **which are understood to**

> **prohibit such practices unless they are codified in an existing collective-bargaining agreement.**

Id., 806 F.2d at 1114 (emphasis added) (citing *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), and *Hudson Chemical Co.*, 258 NLRB 152, 157 (1981).

In *Hilton's Environmental, Inc.*, 320 NLRB 437 (1995), the issue faced by the Board involved the rights and duties of a successor employer with respect to making unilateral changes. In a portion of the ALJ's discussion that the Board did not disturb, the ALJ summarized concisely the existing law on provisions that do and do not require a current and valid contract term to remain valid:

> The seminal case on this point is *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 2d 230 (1962). In *Katz*, an employer was held to have violated its duty to bargain in good faith under Section 8 (a)(5) of the Act by unilaterally changing an existing term or condition of employment, without first bargaining with the union in good faith to impasse. The *Katz* doctrine includes situations where a collective-bargaining agreement has expired and negotiations for a new agreement have not yet produced one. . . There are exceptions to the *Katz* rule. **Terms and conditions of employment which are so rooted in a contract that they cannot exist outside the framework of an existing agreement do not survive the expiration of a contract. Such terms include union-security clauses, checkoff**, no-strike provisions, and the arbitration of post-expiration disputes. . .

Id. (emphasis added) at 453.

The well-settled nature of this principle, both at the Board level and the United States Court of Appeals level, must not be ignored.[1] Cases have continued to reinforce its continued vitality. *See Teamsters Local 70 (Sea-Land of California)*, 197 NLRB 125, 128 (1972), *enfd. per curiam* 490 F.2d 87 (9th Cir. 1973); *Peerless Roofing Co.*, 247 NLRB 500, 505 (1980), *enfd*. 641 F.2d 734 (9th Cir. 1981); *Ortiz Funeral Home*, 250 NLRB 730, 731 fn. 6 (1980), *enfd. on other grounds* 651 F.2d 136 (2d Cir. 1981), *cert. denied* 455 U.S. 946 (1982); *Robbins Door & Sash Co.*, 260 NLRB 659, 659 (1982); *Petroleum Maintenance Co.*, 290 NLRB 462, 463 fn. 4 (1988); *R.E.C. Corp.*, 296 NLRB 1293, 1293 (1989); *Xidex Corp.*, 297 NLRB 110, 118 (1989), *enfd*. 924 F.2d 245, 254-255 (D.C. Cir. 1991); *AMBAC*, 299 NLRB 505, 507 fn. 8 (1990); *U.S. Can Co.*, 305 NLRB 1127 (1992), *enfd*. 984 F.2d 864, 869 (7th Cir. 1993); *J.R. Simplot Co.*, 311 NLRB 572, 572 (1993), *enfd. mem*. 33 F.3d 58 (1994), *cert. denied*, 513 U.S. 1147 (1995); *Sonya Trucking, Inc.*, 312 NLRB 1159. 1160 (1993); *Katz's Deli*, 316 NLRB 318,

[1] Even the NLRB General Counsel has relied on *Bethlehem Steel* in Advice Memos when determining that Unfair Labor Practice Charges should be dismissed. *See Guerra Nut Shelling Co.*, Case 32-CA-17946-1, 2000 WL 1741920, at Slip Op. 1 (N.L.R.B.G.C., April 11, 2000); and *Pacific Theaters Cal Bowl Center*, Case 21-CA-37873, 2008 WL 833951, Slip Op. at 3 (N.L.R.B.G.C., February 27, 2008; *Sinclair Broadcasting Group d/b/a WGME-TV 13*, Cases 1-CA-45971 and 1-CA-45995, 2010 WL 4685893, Slip Op. at 5 (N.L.R.B.G.C. August 31, 2010).

334 fn. 23 (1995), *enfd. on other grounds* 80 F.3d 755 (2d Cir. 1996); *Sullivan Bros. Printers*, 317 NLRB 561, 566 fn. 15 (1995), enfd. 99 F.3d 1217, 1231 (1st Cir. 1996); *Spentonbush/Red Star Cos.*, 319 NLRB 988, 990 (1995), *enfd. denied on other grounds* 106 F.3d 484 (2nd Cir. 1997); *87-10 51st Ave. Ownership Corp.*, 320 NLRB 993 (1996); *Talaco Communications, Inc.*, 321 NLRB 762, 763 (1996); *Able Aluminum Co.*, 321 NLRB 1071, 1072 (1996); *Valley Stream Aluminum, Inc.*, 321 NLRB 1076, 1077 (1996); *Wilkes Tel. Membership Corp*., 331 NLRB 823, 823 (2000); *Frito-Lay, Inc*., 333 NLRB 1296, 1296 fn. 1 (2001), *vacated by* 51 Fed.Appx. 482, 2002 WL 31318765 (5th Cir. 2002); *The West Co*., 333 NLRB 1314, 1315 fn. 6 (2001); *Miller Waste Mills, Inc*., 334 NLRB 466, 466 (2001); *Public Service Co. of Ok (PSO)*, 334 NLRB 487, 487 fn. 2 (2001); *Beverly Health and Rehab. Svcs., Inc*., 335 NLRB 635, 635 fn. 4 (2001); *Quality House of Graphics, Inc*., 336 NLRB 497, 497 fn. 3 (2001); *The Concrete Co.*, 336 NLRB 1311, 1317 (2001); *Hacienda Resort Hotel and Casino (Hacienda I)*, 331 NLRB 665 (2001) (*Hacienda I*), *vacated by* 309 F.3d 578 (9th Cir. 2002); on remand, 351 NLRB 504 (2007) (*Hacienda II*), *vacated by* 540 F.3d 1072 (9th Cir. 2008); on remand, 355 NLRB No. 154 (2010) (*Hacienda III*), *vacated by* 657 F.3d. 865 (9th Cir. 2011).

Various court decisions have specifically endorsed the proposition that an employer's obligation to check off dues terminates at contract expiration. *See*, *e.g.*, *Industrial Union of Marine & Shipbuilding Workers*, 320 F.2d at 619; *Southwestern Steel*, 806 F.2d at 1114; *Xidex v. NLRB*, 924 F.2d at 254-255; *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d at 1231 (1st Cir. 1996); *Local Union No. 1, Bakery, Confectionery, Tobacco Workers and Grain Millers Intern. Union, AFL CIO, CLC v. Mel-O-Cream Donuts Int'l, Inc.*, 318 F.Supp.2d 711, 718 (C.D.Il. 2004). This well-established holding has also been recognized by the Supreme Court in *Litton Business Systems v. NLRB*, 501 U.S. 190, 198-199, 111 S.Ct. 2215, 115 L.Ed. 2d 177 (1991).

There is good reason that there is nearly fifty years of consistent case law recognizing union dues checkoff as strictly contractual and no longer enforceable after the expiration of a Collective Bargaining Agreement. The reason is **not** because the Board has the authority to treat or not treat union dues checkoff as strictly contractual. The reasons is that Section 8(a)(3) and Section 302(c)(4), read to together, limit an employer's obligation under a union dues checkoff clause to the terms of a valid, existing, unexpired Collective Bargaining Agreement. Both the Board and the courts have recognized the strictly contractual nature of union dues checkoff and that

such a provision is inextricably tied to the contract itself. *McClatchy Newspapers, Inc.*, 131 F.3d 1026, 1030 (D.C. Cir. 1997); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 869-870 (7th Cir. 1993) ("Checkoff of dues and other payments from the employer to the union, like the enforcement of the union security clause, depend on the existence of a real agreement with the union."); *Xidex Corp*., 924 F.2d at 254-255.

For the Board to reverse nearly fifty years of consistent precedent would be tantamount to usurping the role of Congress and, via executive fiat, legislating a change in the National Labor Relations Act. This the Board does not have authority to do.

For the Board to reverse nearly fifty years of consistent precedent will also hurt the agency's credibility. Such an abrupt about-face is unlikely to receive great deference at the U.S. Court of Appeals level. *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently-held agency view."); *See also Salazar v. Butterball, LLC*, 644 F.3d 1130 (10th Cir. 2011).

II. THE PRECEDENT ESTABLISHED BY *BETHLEHEM STEEL* IS NEARLY FIFTY YEARS OLD AND SHOULD CONTINUE TO BE RESPECTED TO PROMOTE STABILITY IN THE COLLECTIVE BARGAINING ARENA.

A. A FIFTY-YEAR-OLD PRECEDENT SHOULD BE ALLOWED TO STAND.

The *Bethlehem Steel* precedent has clearly come to stand for the general rule that an employer's dues/checkoff obligation terminates at contract expiration. As previously noted, this well-established precedent has been cited and relied upon in numerous Board and Court decisions.

The *Bethlehem Steel* precedent has remained intact as administrations in Washington have changed and as the composition of the NLRB has changed in both Republican and Democratic administrations. There is just no good reason to disturb this well-established principle.

The basic legal principle of *stare decisis* commands that the Board have respect for its long-standing earlier decisions and the principles of law they communicate. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 127 S.Ct. 2705, 168 L.Ed. 2d 623 (2007) ("For the decision . . . is almost a century old. So there's an argument for its retention on the basis of *stare decisis* alone . . . Concerns about maintaining settled law are strong when the question is one of statutory interpretation"); *Randall v. Sorrell*, 548 U.S. 230, 243-244, 126 S.Ct. 2479, 165 L.Ed. 2d 482 (2006)

("*Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification" . . . This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time."); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32, 126 S.Ct. 514, 163 L.Ed. 2d 288 (2005) ("Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of this statute has been accepted as settled law for several decades."); *Neal v. U.S.*, 516 U.S. 284, 295, 116 S.Ct. 763, 133 L.Ed. 2d 709 (1996) (Our reluctance to overturn precedent derives in part from institution concerns about the relationship of the Judiciary to Congress. One reason we give great weight to *stare decisis* in the area of statutory construction is that "Congress is free to change this Court's interpretation of this legislation."); *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077 (9th Cir. 2009) ("But our legal system has no sunset provision for precedents. We use decades' old and centuries' old precedent to achieve consistency over time.").

Many more cases could be cited for this principle of *stare decisis*. The bottom line is this: The bright line of *Bethlehem Steel* has been the law for

almost fifty years; it is both well-settled, and well-understood by management and labor, alike. As the cases cited above demonstrate, the argument to continue to recognize *Bethlehem Steel* is compelling because this nearly fifty-year-old precedent is a question of statutory interpretation. If it is to be changed, that is the province of Congress—not the NLRB.

B. CESSATION OF UNION DUES CHECKOFF UPON CONTRACT EXPIRATION IS A DECADES-OLD RECOGNIZED ECONOMIC WEAPON OF EMPLOYERS.

Union dues checkoff is a means by which the employer provides economic assistance to a union by deducting union dues from the paychecks of employees and forwarding the money to the union.[2] When parties are engaged in collective bargaining for a new contract to succeed one that has expired, both parties should be free to use economic weapons to pressure the other party to agree to their respective bargaining positions. Just like a strike or lockout, cessation of union dues checkoff places economic pressure on the other party to come to agreement. *See Hacienda Resort Hotel and Casino (II),* 351 NLRB 504 (2007) (In his concurring opinion, NLRB Chairman Battista stated: "In my view, since, as discussed above, a union is released from a no-strike pledge following contract expiration, and an

[2] Section 8(a)(2) of the Act prohibits an employer from providing financial support to a labor organization. Payroll deduction of union dues is an exception to this prohibition.

employer is released from a no-lockout pledge, it would be anomalous to hold that an employer remains bound . . . to refrain from using what is literally an economic weapon at its disposal—the elimination of dues checkoff.").

The actions of the Acting General Counsel in this case are nothing more than an attempt to disturb the balance of power between employers and unions in the collective bargaining process. *See Hacienda Resort and Casino Hotel and Casino (III)*, 355 NLRB No. 154 (2010) ("Further, like strikes and lock-outs, an employer's ability to cease dues checkoff on contract expiration has become a recognized economic weapon in the context of bargaining for a successor agreement."). Congress intended for the stronger party in collective bargaining to prevail. It is not the role of the NLRB to tip the balance of power in favor of one party or the other by eliminating one of their economic weapons. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-109, 90 S.Ct. 821, 25 L.Ed. 2d 146 (1970) ("But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lock-outs will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."); *NLRB*

v. Insurance Agents Int'l Union, 361 U.S. 477, 488-490, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960) (One writer recognizes this by describing economic force as a prime motivating power for agreements in collective bargaining. Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess.); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608-614, 106 S.Ct. 1395, 89 L.Ed. 2d 616 (1986) ("Although the labor and management relationship is structured by the NLRA, certain areas intentionally have been left to be controlled by the free play of economic forces."); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965) (The Act also contemplated a resort to economic weapons should more peaceful measures not avail. [The Act] does not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of an assessment of that party's bargaining power.); *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571 (D.C. Cir. 1992) ("Two leading decisions of the Supreme Court have emphatically denied the Board the power, under the guise of enforcing the duty to bargain in good faith, to

regulate what economic weapons a party [to the bargaining] might summon to its aid . . . There, the Court treated the Board's effort to draw some distinction between proper and abusive economic weapons as an impermissible entry of the Board into the substantive aspects of the bargaining process.")

Just as employers do not look forward to the loss of revenue that might be caused by a strike, unions do not look forward to the loss of revenue caused by cessation of union dues checkoff. The use or potential use of these economic weapons motivates the parties to reach new collective bargaining agreements.

C. TO OVERRULE *BETHLEHEM STEEL* UNDER TODAY'S CIRCUMSTANCES WILL BE VIEWED AS A POLITICAL ACT FURTHER DAMAGING THE REPUTATION OF THE NATIONAL LABOR RELATIONS BOARD.

For decades it has been the Board's unwavering practice not to overrule precedent without the affirmative votes of three Board members, regardless of the total number of sitting members. Ironically, that practice was recently affirmed in *Hacienda III*, a case following the *Bethlehem Steel* rule concerning discontinuation of union dues checkoff after contract expiration. In a February 25, 2011 letter from former NLRB Chairman Liebman to the Honorable Phil Roe, Chairman Liebman also reaffirmed the Board's practice not to overrule precedent without the affirmative votes of three Board members. *See* February 25, 2011 letter from former NLRB Chairman Liebman to the Honorable Phil Roe, Chairman, House Subcommittee on Health, Education, Labor, and Pensions. Attached as Exhibit 1.

As this brief is written, the NLRB is composed of members Becker[3], Hayes, and Chairman Pearce. Clearly, Member Hayes in *Hacienda III* favors continuation of the *Bethlehem Steel* rule. To overturn nearly fifty years of precedent with a 2–1 decision as 2011 comes to a close, abandoning the

[3] Member Becker is a recess appointee whose term is set to expire on or about December 31, 2011.

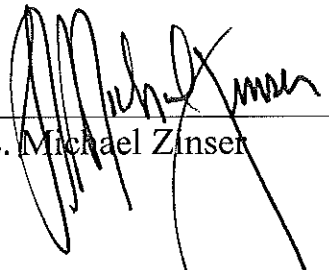
Board's practice of requiring the affirmative votes of three Board members, would be a Board decision showing disrespect for the principle of *stare decisis* in a politically charged environment; it would be a decision disruptive of a collective bargaining principle of nearly fifty years' duration. *See* November 18, 2011 letter from NLRB Member Brian E. Hayes to the Honorable John Kline, Chairman. (Attached as Exhibit 2).

CONCLUSION

ALJ Wedekind in the instant case made a well-reasoned decision, applying nearly fifty years of existing case law. ALJ Wedekind applied the law that is on the books now. For all of the foregoing reasons articulated in this brief, the *amici* urge the Board to affirm the decision of ALJ Wedekind.

DATED: December 20, 2011
Nashville, Tennessee

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF *AMICI CURIAE* CLEAR CHANNEL OUTDOOR, INC., LEE ENTERPRISES, INC., AND STEPHENS MEDIA, LLC, IN SUPPORT OF WKYC-TV, INC, was electronically filed with the NLRB Executive Secretary and served this 20th day of December 2011, on the following people in the following manner:

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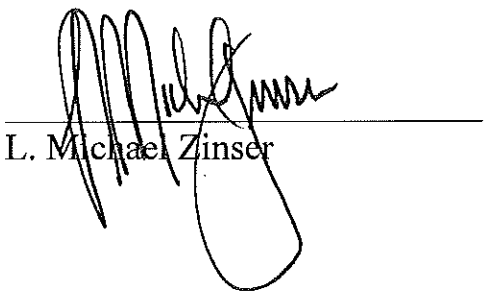

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EXHIBIT 1

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 25, 2011

The Honorable Phil Roe
Chairman, Subcommittee on Health, Education,
Labor, and Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Roe:

I have served as the Chairman of the National Labor Relations Board since January 20, 2009, when I was appointed by President Obama. I have served on the Board since November 14, 1997, when I was confirmed by the Senate after having been nominated by President Clinton. Since then, I was reappointed by President Bush and confirmed by the Senate to a second term in 2002 and a third term in 2006. My current term is set to expire on August 27, 2011.

On February 11, 2011, the Subcommittee held a hearing entitled "Emerging Trends at the National Labor Relations Board." I respectfully request that this letter be included in the hearing record. The views expressed in it are mine alone.

Of the witnesses who testified at the hearing, two were sharply critical of the Board's recent actions: G. Roger King and Philip A. Miscimarra, both attorneys in private practice representing management clients. I will not attempt to respond in comprehensive detail to the assertions made by Mr. King and Mr. Miscimarra. But I do feel obliged to address the main thrust of their testimony: that the Board is somehow overreaching its statutory authority, invading the province of Congress and abandoning long-established institutional norms. Such accusations are simply untrue.[1]

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[1] Mr. King, a critic of the present Board, was a champion of the prior Board, which itself was no stranger to controversy, as a hearing held by this Subcommittee in 2007 evidences. See "The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights," Joint Hearing before the House Subcommittee on Health, Employment, Labor and Pensions and

1. *The Proper Role of a Board with Fewer than Five Confirmed Members*

In his written testimony before the Subcommittee, Mr. King argues that the current Board -- because it consists of four members (not the full five provided for in the National Labor Relations Act) and because it includes one recess appointment[2] -- should not issue major decisions, reconsider existing precedent, or pursue rulemaking. Such "self-imposed restraint," Mr. King insists, is required by the Board's past practice and by "sound public policy."[3]

In fact, accepting Mr. King's view would mean a sharp break with Board tradition and would disable the Board from carrying out its statutory duty. A review of the Board's history shows why. The statute has provided for five Board members since 1947. Between August 1, 1947, and today, the Board has had five sitting members (including both Senate-confirmed members and recess appointees) less than two-thirds of the time. And vacancies on the Board have become far more common – indeed, chronic – in recent years. The last time that the Board had five confirmed members was August 21, 2003, more than seven years ago.

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the Senate Subcommittee on Employment and Workplace Safety (December 13, 2007). The contrast between Mr. King's recent testimony and his prior writings about the prior Board is striking. In 2006, Mr. King observed:

> While both management and labor interests and their advocates certainly have the right to analyze, support or criticize Board decisions, certain of the recent verbal outcries regarding Board decisions are highly partisan, and have the appearance of being part of a coordinated effort to chill and discourage present Board members from addressing many of the important issues and cases before them. Further, an equally unfortunate ancillary part of this apparent coordinated campaign is the suggestion that the Board is no longer a legitimate part of the country's administrative jurisprudence system.

G. Roger King, "'We're Off to See the Wizards,' A Panel Discussion of the Bush II Board's Decisions ... and the Yellow Brick Road Back to the Record of the Clinton Board," paper presented to the Section of Labor and Employment Law, American Bar Association, at p. 1 (2006). Mr. King deplored "Board bashing," argued that "recent attempts to marginalize the Board are ill-advised," observed that the "efficiency and productivity of the Board continues to serve as a role model for many Federal agencies," and noted that "Board precedent from time to time no doubt will continue to be reversed in the future – which is not necessarily bad." *Id.* at pp. 12-13.

[2] Member Craig Becker is serving under a recess appointment. His nomination was filibustered in the Senate in the last Congress, even though a majority of the Senate favored his nomination.

The three confirmed members of the Board are myself, Member Mark Pearce, and Member Brian Hayes. There is one vacancy on the Board.

[3] G. Roger King, Statement to the Record, p. 2 (Feb. 11, 2011).

Needless to say, the Board has often issued major decisions, including decisions overruling precedent, with fewer than five confirmed members. For example, on July 17, 2002, a divided Board issued *MV Transportation*, 337 NLRB 770 (2002), eliminating the successor-bar rule and overruling *St. Elizabeth Manor*, 329 NLRB 341 (1999). At the time, the Board consisted of four members (three Republicans and one Democrat). The three-member majority that overruled precedent consisted entirely of recess appointees: then-Chairman Peter Hurtgen, Member William Cowen, and Member Michael Bartlett. I was the only confirmed Board member, and I dissented. The current Board has announced its intention to reconsider *MV Transportation.* See *UGL-UNICCO Services Co.*, 355 NLRB No. 155 (2010). Mr. King has criticized the Board for doing so, but by his own standard, *MV Transportation* – decided with less than a full Board and without a single confirmed member in the majority – would seem to have been a wholly illegitimate exercise of power.

There is no shortage of decisions in which the prior Board overruled precedent, despite the fact that the three-member (Republican) majority included one or more recess appointees. For example, in 2004, a divided Board overruled precedent in (among other cases) decisions involving the right of employees in non-union workplaces to have a coworker present during investigatory interviews,[4] the employee-status of university teaching assistants,[5] pro-union conduct by supervisors,[6] and bargaining units including joint employees of two employers.[7] The three-member majority in each case included one recess appointee (then-Member Ronald Meisburg). In 2006, a divided Board overruled precedent involving a union's photographing of employees; there were then two recess appointees (then-Member Peter Schaumber and then-Member Peter Kirsanow) in the three-member majority.[8] In 2007, a divided Board overruled precedent in several cases, including (but not limited to) decisions involving the voluntary-recognition bar,[9] the burden of proof for backpay claims,[10] the filing of decertification petitions following unfair labor practice settlements,[11] and the backpay period for union salts subjected to hiring discrimination.[12] In all of these cases and others, the three-member majority included a recess appointee (then-Member Kirsanow).

The approach of the prior Board, to be sure, was not unprecedented. Indeed, the Board has repeatedly overruled precedent when it consisted of only three members in all, but the decision was unanimous. The greatest number of examples comes from the (Republican majority) Board of 1985.[13] A leading instance is *Sears, Roebuck Co.*, 274 NLRB 230 (1985), which involved the right of non-union workers to have a co-worker present at investigatory interviews.

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4 *IBM Corp.*, 341 NLRB 1288 (2004).

5 *Brown University*, 342 NLRB 483 (2004).

6 *Harborside Healthcare,* 343 NLRB 906 (2004),

7 *Oakwood Care Center*, 343 NLRB 659 (2004).

8 *Randell Warehouse of Arizona*, 347 NLRB 591 (2006).

9 *Dana Corp.*, 351 NLRB 434 (2007).

10 *St. George Warehouse*, 351 NLRB 961 (2007).

11 *Truserv Corp.*, 349 NLRB 227 (2007).

12 *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

13 See *Hacienda Resort Hotel & Casino*, 355 NLRB No. 154, slip op. at 2 fn. 1 (2010) (concurring opinion) (collecting cases).

Let me be clear that I am not criticizing the practice of prior Boards. In none of my dissents in the more recent decisions cited did I suggest that the majority acted improperly because of how it was constituted. What I do contend, however, is that Mr. King's position has little if any support in the Board's history. The Board's tradition, rather, is not to overrule precedent with fewer than three votes to do so, as Member Pearce and I have explained in a recent concurring opinion.[14] Whether the Board consists of three, four, or five members in total, and whether the three-member majority includes recess appointees, has generally made no difference.

In his testimony at page 2, Mr. King quotes -- without explaining the context -- a statement from my partial dissent in *Teamsters Local 75 (Schreiber Foods)*, 349 NLRB 77 (2007). My dissent in that case in no way supports Mr. King's criticism of the current Board.

In *Schreiber Foods*, the point of contention between Member Schaumber and myself was how to interpret a statement in the Board's 2002 opposition to a petition for writ of certiorari, submitted to the Supreme Court, involving an earlier Board decision, *Meijer, Inc.*, 329 NLRB 730 (1999). In his own partial dissent, Member Schaumber argued that the Board should overrule *Meijer*. He contended that the Board, in its opposition, had essentially promised the Supreme Court that *Meijer* would be reconsidered by the Board (and thus that there was no need for the Court to review the decision). I disagreed with Member Schaumber's reading of the opposition, pointing out that at the time, the Board had only three members, and at most two of them would have supported overruling *Meijer*, since I had been in the majority in that decision. "Given the Board's well-known reluctance to overrule precedent when at less than full strength (five Members)," I wrote, "the Board could not have been signaling to the Court that full-dress reconsideration of *Meijer* was in the offing." 349 NLRB at 97. While my statement in *Schreiber* arguably could have been more precise, I was referring to the Board's tradition that three *votes* are required to overrule precedent, and not asserting that a Board of fewer than five members would never do so.[15]

All of this said, I certainly believe that the ideal situation is for the Board to operate with five, Senate-confirmed members. That ideal, however, has been increasingly difficult to achieve. In my more than 13 years on the Board, I have served as the *sole* member (for six weeks) and on two-, three-, four-, and five-member Boards. Indeed, the Board recently spent a full 27 months with only *two* members, a truly unfortunate situation that led to an adverse Supreme Court decision after Member Schaumber and I, pursuant to a prior delegation by the other Board members and relying on a legal opinion from the Department of Justice, continued to issue decisions where we could reach agreement.[16] When the Board has a lawful quorum (at least three

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[14] *Id.*, slip op. at 2 & fn. 1 (citing cases).

[15] More often than not, given the make-up of the Board, a three-vote majority is formed when the Board comprises five members and divides three-two. But, as the cases I have cited above illustrate, the Board has, in fact, reversed precedent with three votes when it was at *less* than full strength, consisting of three or four members. At the time of the *Meier* opposition, however, the Board consisted of just three members: two recess appointees, Member Bartlett and Member Cowen, and myself. I had been in the majority in *Meijer*. A two-one Board, adhering to tradition, would not have overruled *Meijer* and would not have told the Supreme Court that it intended to do so.

[16] *New Process Steel, L.P. v. NLRB*, ___ U.S. ___, 130 S. Ct. 2635 (2010).

members), it has the authority to decide any case that comes before it and to engage in any rulemaking permitted by the statute. Given the chronic vacancies that have plagued the Board in recent years, it would be an abdication of the Board's statutory duty to defer acting on important issues until, at some unknowable time in the future, it has five confirmed members. As I have pointed out, it has been more than seven years since that ideal has been realized.

2. *The Proper Role of the Board in Shaping Federal Labor Policy*

In his written testimony, Mr. Miscimarra suggests that the current Board is somehow intruding into the exclusive province of Congress. That suggestion is unwarranted.

It is indisputable that the Board has only the authority that Congress has given it in the National Labor Relations Act. The statute informs, guides, and ultimately constrains everything the Board does. The Supreme Court, in turn, is the ultimate arbiter of what the statute means.

In determining how narrow, or how broad, the Board's authority is, then, it is necessary and proper to turn to the Supreme Court's decisions applying the National Labor Relations Act. Here is what the Supreme Court has said in one, typical decision:

> This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy....
>
> This Court therefore has accorded Board rules considerable deference.... We will uphold a Board rule as long as it is rational and consistent with the Act, ... even if we would have formulated a different rule had we sat on the Board.... Furthermore, a Board's rule is entitled to deference even if it represents a departure from the Board's prior policy.

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990) (citations omitted). These principles follow from the fact that the National Labor Relations Act is, in many respects, written in general terms and, within those fairly wide limits, leaves it to the Board to develop specific legal rules regarding unfair labor practices and union representation elections. As the Supreme Court has observed, the Board, "if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978).

Mr. Miscimarra's testimony offers a view of the Board's authority as sharply limited, a view that seems to give very little weight to what the Supreme Court has said, again and again. He then criticizes certain recent decisions of the Board as amounting to policy changes that only Congress can make. It is certainly true that Congress has the ultimate authority to address any and every issue of labor law considered by the Board. Where Congress has addressed an issue, there is no question that the Board is duty-bound to apply the law. But if Congress has *not* spoken – and this will often be the case – the Board has the authority and the duty to decide the issue, as the Supreme Court has repeatedly recognized. If the Board oversteps its authority, of course, the federal courts can overturn its decision.

Mr. Miscimarra cites the Board's recent decisions finding a union's stationary display of large banners near a secondary employer's worksite to be lawful. The lead decision on this issue is *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159 (2010). The National Labor Relations Act nowhere refers to banners. The key statutory provision, Section 8(b)(4) (ii), rather, uses very general language: a union may not "threaten, coerce, or restrain" a secondary employer. Does the stationary display of a banner violate that prohibition? That is a classic question of labor law policy -- never addressed, incidentally, by any earlier Board decision or by the Supreme Court. And it is a question that requires consideration of serious First Amendment constitutional concerns, as well, as the *Eliason* decision explains. Notably, every federal court to consider the question has found bannering displays to be lawful – rejecting the view of the prior Board General Counsel, who sought to enjoin the displays pending litigation before the Board. See *Eliason*, supra, 355 NLRB No. 159, slip op. at 1 fn. 3. The Board had the authority and the duty to decide *Eliason* and similar cases. It could not simply wait for Congress – which has not amended the Act with respect to secondary activity by unions since 1959 – to decide the question. In my view, the *Eliason* decision was correct, but it is subject to review in the federal appellate courts and ultimately by the Supreme Court.

The same is true of the Board's decision in *Dana Corp.*, 356 NLRB No. 49 (2010). Nothing in the language of the Act answers the question posed there – the legality under Section 8(a)(2) of a pre-recognition framework agreement – and neither does any previous decision of the Board or the Supreme Court.[17] Section 8(f) of the Act, invoked by Mr. Miscimarra, involves pre-hire agreements in the construction industry, and it has no bearing at all on the issue posed in *Dana*. With all due respect, his suggestion that "this is another area where policy changes should originate in Congress" is very difficult to comprehend. Meanwhile, the Board's decision has been praised by other commentators.[18]

Finally, Mr. Miscimarra points to *New York University*, 356 NLRB No. 7 (2010), which involves the question of whether university graduate assistants are statutory employees for purposes of the Act. The Act's definition of "employee," Section 2(3), says that the term "shall include any employee," except for certain specified exclusions (e.g., "agricultural laborer[s]"). No one argues that graduate assistants are specifically excluded. Again, the general language of the Act leaves the issue for the Board to decide, within appropriate limits. The Supreme Court has made that much clear, in upholding the Board's decision that union salts are statutory employees.[19] Any determination of who is, and who is not, a statutory employee necessarily involves determining the coverage of the Act. Whenever the Board finds employee status, then, it could be argued that it is somehow expanding the Act's scope. But that argument is unsound, unless one accepts the curious proposition that the Board has the authority only to find that contested categories of workers are *not* statutory employees.

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[17] The Board's decision explained with great care why an earlier Board decision cited by Mr. Miscimarra, *Majestic Weaving Co.*, 147 NLRB 859 (1964), was not controlling.

[18] See Andrew M. Kramer and Samuel Estreicher, *NLRB Allows Pre-recognition Framework Agreements*, 245 New York L.J. 4 (Feb. 23, 2011).

[19] See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

In sum, the Board has addressed, and will address, the sorts of questions that every prior Board has ruled upon. In doing so, it will be fulfilling exactly the role that Congress envisioned for the Board, when it enacted the National Labor Relations Act in 1935. And its decisions will be subject to judicial review, with the federal courts sometimes agreeing, and sometimes disagreeing, with the Board. Speaking for myself, I have previously made clear my view that the Board operates under significant constraints – the language of the statute, its own precedent, and judicial review – and that fundamental changes in federal labor law can come only from Congress.[20]

3. *The Board's Recent Requests for Briefing in Certain Cases*

Among the most perplexing of the criticisms made by Mr. King is his objection to the Board's requests in certain cases for *amicus* briefs. Mr. King describes this as "indirect rulemaking." While I do not believe that it is appropriate for me to comment publicly on cases that are pending at the Board, I have no hesitation in defending, as a general matter, the practice of inviting *amicus* briefs.

This practice plainly serves three important interests: open government, fair process, and informed decision-making. Surely it is better to tell the public what issues the Board intends to consider, and to permit interested persons to participate in the Board's decision-making process, than it is to keep the public in the dark and to exclude stakeholders from participation. And surely it is better that the Board have the benefit of the views of the larger labor-management community, not just the perspectives of the parties to a particular case.

* * *

For the reasons I have explained, I believe that the criticisms of the Board offered at the hearing are unwarranted.[21] What are the "emerging trends" at the Board? I think there are three.

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[20] For example, in remarks delivered as part of the Access to Justice Lecture Series at Washington University Law School on February 17, 2010, I said: "I do not think that fundamental changes in labor law – as opposed to incremental improvements – can reasonably be expected to come from the National Labor Relations Board, whoever serves there."

[21] I might add, however, that the Board has never been a stranger to criticism or controversy. As one commentary observed a quarter century ago:

> The only change [over the years] has been in the nature of the Board's critics – sometimes management, sometimes labor, sometimes both – depending on which group felt at any given moment that its ox had been gored by the conflicting interpretations given to various sections of the law by the shifting majorities in control of the NLRB in Democratic and Republican administrations. The list of the Board's detractors is by no means confined to those directly involved in the cases before it for adjudication. The roster has embraced almost everyone at one time or another—Presidents of the United States, Congress, the federal judiciary, and that most insatiable of faultfinders, the press.

A. H. Raskin, *Elysium Lost: The Wagner Act at Fifty,* 38 Stan. L. Rev. 945, 948 (1986).

First, greater productivity in decision-making, reflecting the Board's new quorum and with it, the ability to decide cases and to avoid deadlock. Second, greater transparency and public participation in its decision-making – perhaps at the price of greater controversy, but with a corresponding gain in the fairness and quality of the Board's decision-making process. Third, a willingness to take carefully considered steps to keep the National Labor Relations Act vital, as exemplified in the Board's unanimous decision to begin awarding compound interest on backpay awards to employees victimized by unfair labor practices – more than 20 years after the Board was first urged to adopt that remedial change.[22]

Thank you for the opportunity to submit this statement. I appreciate the Subcommittee's interest in the Board's work, and I look forward to a respectful dialogue about the important issues that the National Labor Relations Act requires the Board to address.

Sincerely,

Wilma B. Liebman
Chairman

cc: Hon. Robert Andrews, Ranking Member

22 *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

EXHIBIT 2

BRIAN E. HAYES
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MEMBER
NATIONAL LABOR RELATIONS BOARD
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The Honorable John Kline, Chairman
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

November 18, 2011

Dear Chairman Kline:

I am in receipt of your letter to the National Labor Relations Board dated October 27, 2011, in which you requested information regarding the Board's current rule-making activity. Specifically, your letter sought information regarding the posture of the Board's current proposed rule that would implement sweeping changes to the NLRB's Representation Case Procedures. Those proposed changes were contained in a Notice of Proposed Rule-Making published in the Federal Register on June 22, 2011.[1]

The Board's Solicitor answered your correspondence in a letter dated November 10. As I did not believe the November 10 correspondence to be fully responsive, and believed it to be misleading, I declined to approve its content.

The central fact omitted from the November 10 response letter is that *there is a timeline for anticipated actions.* My colleagues are committed to issuing a final R Case Rule before Member Becker's recess appointment expires at the end of the current Congressional session. Indeed, I was advised of this fact by the Board's Chairman on the very day that the response letter was forwarded to your office. I was further advised that in the event I did not agree with the final R Case Rule, it would, nonetheless, be approved and published based on their two-member vote. Moreover, if, as will necessarily be the case, I am not afforded the requisite opportunity to review and draft a dissent to the rule, I was advised that I would be limited to doing so after publication of the rule. As more fully explicated below, these actions would contravene long-standing Board tradition and the Board's own internal operating rules. These rules and traditions have been established to protect the legitimacy of the Board. They cannot, in

[1] 76 FR 36812.

my view, simply be cast aside in pursuit of a singular policy agenda without doing irreparable harm to the Board's legitimacy. Further, absent my agreement to delegate decisional authority on this matter to a group of three Board members, I have substantial doubts about the legal viability of my colleagues' proposed course of action in light of the Supreme Court's *New Process* decision[2] and the representations made by the Board to the Court during the course of that litigation.[3]

Let me briefly outline the specifics of my concern. As you are aware, prior to the expiration of former Chairman Liebman's term, the 3-member Democratic majority took a number of actions to which I dissented. Among those actions was the June 22 Notice of Proposed Rulemaking that contemplates an unprecedented and sweeping series of changes to the Board's representation election procedures.[4] The period for written comments and replies to comments closed on September 6. The website source for reporting such comments indicates that 65,957 comments were filed.

In my dissent to the Notice of Proposed Rulemaking, I criticized the majority's use of "a rulemaking process that is opaque, exclusionary, and adversarial," in contravention of the spirit of the Administrative Procedure Act, the Government in Sunshine Act, and President Obama's January 21, 2009, Memorandum on Transparency and Open Government, and in sharp contrast to the Board's procedural practice during the 1987 – 1989 rulemaking for appropriate bargaining units in the health care industry. That criticism apparently made no impression on my colleagues, who have continued this process in the same manner, and without my participation; and, who have now made it unequivocally clear that they intend to publish a final rule before the expiration of Member Becker's appointment without regard to Board tradition or rule. Utilizing a team of attorneys and examiners from their own staffs, the office of the Executive Secretary, various offices of the Acting General Counsel, and regional offices, quite possibly in violation of Section 4(a) of the Act, they are drafting a final rule with responses to comments filed without my participation or input.[5] Until this week, my colleagues and the team of attorneys that they have enlisted from throughout the Agency have shared absolutely nothing with me or my staff save for a single CD which merely sorts or "codes" the over 65,000 public comments in differing degrees of support or opposition to the rule. There have been no comprehensive summaries of

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[2] 130 S.Ct. 2635 (2010).

[3] Brief of NLRB p. 21 n. 16, citing, inter alia, *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 991 & n.1 (1988), enforced, 879 F.2d 1526 (7th Cir. 1989) 2010 WL 383618.

[4] 76 FR 36812.

[5] I note that my colleagues did not provide you with a requested list of Board staff involved in this process, although that information is available to them, but not to me. I note as well the amount of time spent by Board staff on rulemaking to expedite the conduct of representation elections has had a serious adverse impact on the Board's ability to process pending unfair labor practice and representation cases. The number of final decisions issued in September was far below the norm for that month, and current figures for October indicate a continuing diminution in productivity. My colleagues have attempted to disguise this fact by providing you with their Exhibit 3, inflating the number of monthly Board decisions by adding actions that are not traditionally included in Board productivity reports, such as the November 8, 2011 press release for case production in FY 2011. See http://www. nlrb.gov. Still, even by these misleadingly inflated numbers, the adverse impact of the use of staff on rulemaking is demonstrable.

the over 65,000 public comments circulated or shared with my staff, no drafts of the proposed responses to the comments circulated or shared, and, with one exception, no indication of what portions of the 185 page proposed rule my colleagues intend to include, exclude, modify or add to their draft of the final rule. That exception involved a take-it-or-leave it "compromise proposal" presented to me Tuesday, with a deadline for acceptance by noon today, Apart from compelling my agreement to the compromise rule itself, my colleagues' proposal would also have bound me to an unprecedented "emergency" revision of the ordinary internal rules for processing all pending cases from now until the end of Member Becker's term. In effect, the "emergency" procedures would deprive me of any meaningful opportunity to consider the majority position, much less prepare a response, in any number of cases. This process, or, more accurately, lack of process, is so diametrically at odds with traditional decisional processes of the Board that it quite frankly defies description.

My colleagues' procedural preferences bear an unfortunate resemblance to those of the Democratic majority at the National Mediation Board in changing the majority vote requirement for elections conducted by that agency. Indeed, NMB Chairman Elizabeth Dougherty sent a letter to Republican Senators on the Health, Education, Labor, and Pensions Committee objecting to her two colleagues' resort to an arbitrary, exclusionary, and rushed rulemaking process.[6] Like Chairman Dougherty, I would under normal circumstances prefer not to discuss Board process so publicly. However, the circumstances of the present NLRB internal process are even more egregious than in the NMB situation and compel my public protest.

First, and perhaps of greatest institutional significance, is the fact that if my colleagues' final rule resembles the proposed rule---and I reasonably expect that it will---they will be overruling Board rules and precedent, including precedent established in case-by-case adjudication. For decades, it has been the Board's unwavering practice not to overrule extant law without the affirmative votes of 3 Board members, regardless of the total number of sitting members. That practice was recently reaffirmed both in decisional law[7] and in on-the-record representations to Congress by former Chairman Liebman.[8] Now, however, present Chairman Pearce has made clear to me that he intends to issue a final rule even if it is approved by only 2 Board members. To the extent that the Chairman believes the undisputed consistent practice of requiring 3 votes to change Board law somehow should not apply to rulemaking, I strongly believe he is mistaken. There is no basis whatsoever for distinguishing the Board's practice of requiring 3 affirmative votes on a matter of such magnitude on the pretext that this practice has developed in adjudicatory proceedings. The notion that we would not change precedent in the absence of three affirmative votes to do so in a case that may potentially affect only a handful litigants, but would freely do so in a matter affecting every single employer, employee and labor organization that utilizes our representation case procedures cannot be seriously countenanced

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[6] November 2, 2009, Letter from NMB Chairman Dougherty to Republican Members of the Senate Health, Education, Labor, and Pensions Committee.

[7] Hacienda Resort Hotel and Casino, 355 NLRB No. 154 (Aug. 27, 2010).

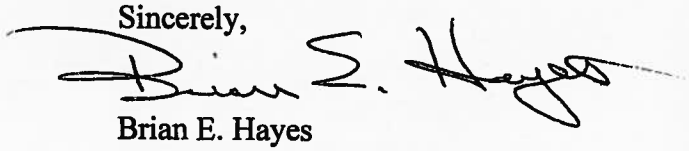
[8] February 25, 2011, Letter from NLRB Chairman Liebman to The Honorable Phil Roe, Chairman, House Subcommittee on Health, Education, Labor, and Pensions.

Second, beyond my colleagues' intent to ignore the Board's decades-old majoritarian requirement, they also plainly intend to contravene the Board's own internal rules regarding the circulation and issuance of majority and dissenting opinions. The most recent expression of that rule, approved by Board vote, is set forth in Executive Secretary Memorandum No. 01-01. That rule provides that when a circulating draft has been approved by two Members of a panel, the remaining Member will act on the matter within 90 days. Only if the minority Member fails to circulate a dissent within the 90 day period can the majority publish and issue without a dissent. Again, while the rule references "cases," there is no rational basis for not applying it to substantive rulemaking as well. Further, the rule has never been enforced, even in circumstances where individual Board members took over a year to circulate a response to a consensus majority opinion. Since no draft of the final rule has circulated as of yet, and since Member Becker's recess appointment will expire in less than 90 days, it is quite clear that the two Board members nevertheless intend to breach the Board's internal operating rule and, for the first time in the history of this agency, not allow the requisite time for preparing or circulating a dissent. Indeed, as noted above, I have been specifically advised of this fact both with respect to publication of a final rule and with respect to a number of significant cases currently pending before the Board.

Finally, I note that my colleagues' rush to final rulemaking judgment is taken in the face of active consideration of H.R. 3094, provisions of which are in direct conflict with the Board's proposed rule. Although I make no comment concerning the merits of this legislative proposal, I believe its pendency provides yet another reason why my two colleagues should suspend their rulemaking efforts.

Thank you for your consideration of my comments.

Sincerely,



Brian E. Hayes
NLRB Board Member

Cc: The Honorable George Miller, Ranking Member, House Education and the Workforce Committee